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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,  
*Petitioner,*

*v.*

S. E. ALLWRIGHT, Election Judge, and JAMES E.  
LUIZZA, Associate Election Judge, 48th Precinct of  
Harris County, Texas,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE**

↓ WHITNEY NORTH SEYMOUR,  
*Counsel for*  
*American Civil Liberties Union;*  
*Amicus Curiae.*

*Of Counsel:*

GEORGE CLIFTON EDWARDS,  
*of Dallas, Texas.*

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## Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. Only the consent of the attorney for the petitioner to the filing of this brief has been obtained.

Special reasons in support of this motion are set out in the accompanying brief.

October 18, 1943.

WHITNEY NORTH SEYMOUR,  
*Counsel, American Civil Liberties Union:*

# SUPREME COURT OF THE UNITED STATES

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## BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

### Introduction

The American Civil Liberties Union is a nationwide organization, members of which reside in and are citizens of Texas. It is devoted to the protection of the Bill of Rights and the extension of democratic privileges. It has consistently opposed racial discrimination wherever the problem has arisen, and has fought against unreasonable limitations on the exercise of the right to vote.

Every substantial interference with the ballot is a blow at representative democratic government. We are particularly concerned, therefore, when, as in this case, many qualified citizens are effectively deprived of their participation in the choice of those who are to represent them and thus of the reality of the right to vote, solely because of race and color.

## I

**The importance of primaries and their integral relationship to the right to vote in general is today axiomatic.**

The primary is an integral part of the entire elective machinery. It is essential to the operation of the democratic process that the voter be given an effective choice in a general election. Thus, over the entire nation, the position of the primary, as the means used in selecting the candidates among whom the electorate must choose, is of great importance.

It is common knowledge that in many States the primary is, in effect, the election. Selection of one party ticket or another, depending on the State, is an assurance of election.

"The fact is that the primary is the election in about one-half of the states, one-half of the counties, and one-half of the legislative congressional districts of the nation. The voter's power is practically ended in these instances when the party nominations are once made. Theoretically and legally he can choose members of another party, but practically he will not do so in these jurisdictions. The significance of the primary as a part of the governing process is therefore very great, and should be examined with all the care given to an electoral process of a final nature."

If the shield of the Constitution were to extend no further than the "final" choice it would, in many instances, be no safeguard at all. For the shield to be real

and to accomplish its purpose, it must intervene at the stage when the electoral process may still be influenced by the voter and, therefore, at the primary elections.

## II

**The recent history of the "White Primary" in Texas shows a studied intent to disfranchise the Negro.**

It hardly needs to be said that the commands of the Constitution have not been so uniformly accepted as to assure full participation of our Negro citizens in their electoral rights. Many efforts have been made to frustrate these commands, as previous decisions of this Court and common knowledge attest. Texas, as well as other States, has overlooked the constitutional injunctions. The recent history of changes in the electoral machinery of Texas statutes reflects the disposition to see to it that Negroes shall have no effective voice in the selection of candidates of the dominant party.

In 1923 Texas enacted the following statute:<sup>2</sup>

"All qualified voters under the laws and constitution of the State of Texas who are bona fide members of the Democratic party, shall be eligible to participate in any Democratic party primary election, provided such voter complies with all laws and rules governing party primary elections; however, in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot and not count the same."

<sup>2</sup> Acts 2d C.S. 1923, p. 74, Article 3093a from Acts 1923.

In *Nixon v. Herndon*, 273 U. S. 536, this Court declared the provision violative of the Fourteenth Amendment.

In the next year (1928) the legislature of Texas enacted Ch. 67<sup>3</sup> which permitted a similar result—the elimination of Negro electors. Removing the discrimination denounced by this Court from the face of the statute, it was nevertheless implemented so as to circumvent the decision.<sup>4</sup>

This Court again declined to countenance such discrimination, *Nixon v. Condon*, 286 U. S. 73.

Three weeks<sup>5</sup> after the decision in *Nixon v. Condon*, *supra*, the Texas Democratic State Convention proceeded to a new formula to accomplish the same purpose by adopting the following resolution:

“Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations.”<sup>6</sup>

3. “Article 3107 (Ch. 67, Acts 1927) Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.”

4. Pursuant to this statute the following resolution was adopted by the Texas State Democratic Executive Committee:

“Resolved: That all white Democrats who are qualified and (sic) under the Constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928 and August 25, 1928, and further, that the Chairman and the secretary of the State Democratic Executive Committee be directed to forward to each Democratic County Chairman in Texas a copy of this resolution for observance.”

5. 43 Harv. Law Rev. 812 (1932).

6. See, *White v. County Democratic Executive Committee*, 60 F. (2d) 973, n. 1.

Unfortunately, when this newest episode in the series was presented to the Court, it came up on an inadequate record and the Court sustained the action against challenge under the Fourteenth and Fifteenth Amendments. *Grovey v. Townsend*, 295 U. S. 45. The inadequacies of that record have been corrected in the present record, where the true nature of the present restrictions and their consequences can at last be clearly observed.

This Court has frequently shown its determination not to allow the commands of the Constitution to be avoided by ingenious subterfuges. This record presents a proper opportunity to re-examine the *Grovey* case and to make sure that the franchise is not effectively denied on grounds of race to an important segment of the population of Texas.

### III

**Article 1, Section 2 of the Constitution protects every citizen in his right to choose candidates and vote at congressional elections.**

As far back as *Ex Parte Yarbrough*, 110 U. S. 651,<sup>7</sup> this Court held that the right to vote at Congressional elections was granted by the Federal Constitution, and that it safeguarded a qualified voter at such elections from violence by persons acting in their individual capacities.

In *Nixon v. Herndon*, *supra*, and *Nixon v. Condon*, *supra*, the protection of the Constitution was applied to attempts by State authorities to deprive the voter of his constitutional rights in primary elections.

<sup>7</sup> See *United States v. Mosley*, 238 U. S. 383; *Swafford v. Templeton*, 185 U. S. 487; *Wiley v. Sinkler*, 179 U. S. 58.

In *United States v. Classic*, 313 U. S. 299, this Court held that the protection of the Constitution extends to qualified voters in primary elections for Federal office. In view of that decision it is difficult to see how studied interference with the right to vote in Federal elections can be without constitutional protection however the interference is disguised.

#### IV

**This Court should now overrule its decision in *Grovey v. Townsend*.**

*Grovey v. Townsend*, *supra*, was decided on demurrer so that the Court was necessarily restricted in its consideration.

The evidence, now for the first time fully presented in the record before the Court, indicates, among other things, that the Democratic party is not a closely organized private voluntary association with the usual attributes of such bodies;<sup>8</sup> that the election laws of the State of Texas are actually so closely integrated with primary procedures that they cannot be separated from the actions of the Democratic party; and that the primary is, in fact, the election in Texas.

When grave constitutional questions are re-presented on records which permit a complete consideration and where the nature and consequences of discrimination are fully disclosed as they are here, the Court should have no reluctance to reconsider and reverse an earlier decision. (See the dissenting opinions in *Burnet v. Coronado Oil*

8. Cf. Merriam and Overacker, *Primary Elections* (1928), at p. 140; "The theory of the party as a voluntary association has been completely overthrown by the contrary doctrine that the party is in reality a governmental agency, subject to legal regulation and control."

& Gas Co., 285 U. S. 393.)<sup>9</sup> In the present state of the world, a further declaration by this Court of the principles underlying the constitutional safeguards of the ballot, denying the power of the majority, on grounds of race or color, to repress a minority which is contributing so much to the nation's cause, would be heartening to all who believe in human liberty and dignity.

### Conclusion

The effective corollary of the great freedoms guaranteed by the Constitution is the right to vote. A reversal in this case should go far towards removing restrictions which now, especially, have no proper place in our democracy.

Respectfully submitted,

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<sup>9</sup> This Court has only recently overruled two of its decisions involving important civil rights. See *Murdock v. Pennsylvania*, 87 Law. Ed. 827, overruling *Jones v. Opelika*, 316 U. S. 597; and *West Virginia State Board of Education*, 87 Law. Ed. 1171, overruling *Minersville School Dist. v. Gobitis*, 310 U. S. 586.